

CHAPTER 14

RULES PERTAINING TO THE FAMILY LEAVE ACT

Authority

N.J.S.A. 34:11B-16.

Source and Effective Date

R.1996 d.482, effective September 16, 1996.
See: 28 N.J.R. 3510(a), 28 N.J.R. 4484(a).

Executive Order No. 66(1978) Expiration Date

Chapter 14, Rules Pertaining to the Family Leave Act, expires on September 16, 2001.

Chapter Historical Note

Chapter 14, Rules Pertaining to the Family Leave Act, was adopted as R.1991 d.475, effective September 16, 1991. See: 23 N.J.R. 1993(a), 23 N.J.R. 2864(b). Pursuant to Executive Order No. 66(1978), Chapter 14 was readopted as R.1996 d.482, effective September 16, 1996. See: Source and Effective Date.

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SUBCHAPTER 1. GENERAL PROVISIONS

Law Review and Journal Commentaries

How Federal Family Leave Compares with N.J. Law. Donna M. Kaye, 136 N.J.L.J. No. 2, 11 (1994).

13:14-1.1 Purpose

The purpose of this chapter is to implement the provisions of N.J.S.A. 34:11B-1 et seq. which provide for family leave for employees in certain cases and prohibit certain employer practices by establishing interpretations of the provisions of that statute.

13:14-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Act” means the “Family Leave Act,” N.J.S.A. 34:11B-1 et seq., unless the context indicates otherwise.

“Base hours” means an employee’s regular hours of work excluding overtime, for which an employee receives compensation.

“Base salary” as used in section 4h(1) of the Act means the salary paid to an employee, excluding overtime, bonuses, etc., but not excluding salary withheld for State, Federal, and local taxes, FICA, employee contributions to any pension, health and/or insurance plans or programs, etc.

“Care” means, but is not limited to, physical care, emotional support, visitation, assistance in treatment, transportation, assistance with essential daily living matters and personal attendant services.

“Child”, for the purpose of determining whether an employee is eligible for family leave because of such employee’s parental status, means a child as defined in the Act to whom such employee is a biological parent, adoptive parent, foster parent, step-parent, or legal guardian, or has a “parent-child relationship” with a child as defined by law, or has sole or joint legal or physical custody, care, guardianship or visitation with a child.

“Consecutive leave” means leave that is taken without interruption based upon an employee’s regular work schedule, and does not include breaks in employment in which an employee is not regularly scheduled to work. (For example, when an employee is normally scheduled to work from September through June and is not scheduled to work during July and August, a leave taken continuously during May, June and September shall be considered a consecutive leave.)

“Disability leave” means any period of leave for which the employee is disabled (that is, unable to perform his or her work) including, but not limited to, any period of time during which an employee is collecting disability benefits.

“Disrupt unduly the operations of the employer”, as used in sections 4a(3) and 5b of the Act, means an intermittent or reduced leave schedule that, if implemented, would cause the employer measurable harm, economic or otherwise, significantly greater than any measurable harm which would befall the employer if the same employee was granted a consecutive leave. The burden of proof in these instances rests with the employer and will be determined by the Division on a case by case basis.

“Eligible employee” means any individual employed by the same employer in the State of New Jersey for 12 months or more and has worked 1,000 or more base hours during the preceding 12 month period. An employee is considered to be employed in the State of New Jersey if:

1. Such employee works in New Jersey; or
2. Such employee routinely performs some work in New Jersey and the employee’s base of operations or the place from which such work is directed and controlled is in New Jersey.

“Employer” means:

1. Effective May 4, 1990, an “employer” shall mean an employer as defined in the Act, which employs 100 or more employees, whether employed in New Jersey or not, who have worked each working day for 20 or more workweeks during the current or immediately preceding calendar year.
2. Effective May 4, 1991, an “employer” shall mean an employer as defined in the Act which employs 75 or more employees, whether employed in New Jersey or not, who have worked each working day for 20 or more workweeks during the current or immediately preceding calendar year.
3. Effective May 4, 1993, an “employer” shall mean an employer as defined in the Act which employs 50 or more employees, whether employed in New Jersey or not, who have worked each working day for 20 or more workweeks during the current or immediately preceding the calendar year.

“Health care provider” means any person licensed under Federal, state, or local law, or the laws of a foreign nation, to provide health care services; or any other person who has been authorized to provide health care by a licensed health care provider.

“Health insurance policy” means all health benefits provided by an employer to an employee. Health benefits includes the opportunity provided by an employer to participate in a group health plan.

“Intermittent leave” means a non-consecutive leave comprised of intervals each of which is at least one but less than 12 workweeks within a consecutive 12 month period.

“Reduced leave” means a non-consecutive leave of up to the equivalent of 12 workweeks which is taken in increments of not less than one workday, unless otherwise agreed to by the employee and employer, but less than one workweek at a time.

“Reduced leave schedule” means a reduced leave that is scheduled for not more than 24 consecutive weeks.

“Serious health condition” means an illness, injury, impairment, or physical or mental condition which requires:

1. Inpatient care in a hospital, hospice, or residential medical care facility; or
2. Continuing medical treatment or continuing supervision by a health care provider.

“Spouse” means a person to whom an employee is lawfully married as defined by New Jersey law.

“Substantial and grievous economic injury” as used in section 4h(2) of the Act means economic harm that will befall an employer which is of such a magnitude that it would substantially and adversely affect the employer’s operations, considerably beyond the costs which are associated with replacing an employee who has requested family leave.

“Workweek” means the number of days that an employee normally works each calendar week, irrespective of the number of hours worked each day. (For purposes of a reduced leave, an employee who normally works five days each calendar week is entitled to a maximum of 60 days of family leave. An employee who normally works four days each calendar week is entitled to a maximum of 48 days of family leave).

Case Notes

Under New Jersey law as predicated by federal court, the New Jersey Family Leave Act’s definition of “employer” did not exempt firms that employed fewer than 50 people within New Jersey. *Callari v. Rehau Inc.*, 14 F.Supp.2d 620 (D.N.J. 1998).

“Base hours” include regular hours for which employee is paid workers’ compensation benefits, as that term is used in Family Leave Act section defining “employee.” *Kenney v. Meadowview Nursing and Convalescent Center*, 706 A.2d 295, 308 N.J.Super. 565 (A.D. 1998).

Corporation having less than dozen employees in New Jersey, but with 164 employees in six states, was “employer” for purposes of New Jersey’s Family Leave Act. *Essex Crane Rental Corp. v. Director, Div. on Civil Rights*, 294 N.J.Super. 101, 682 A.2d 750 (A.D.1996).

13:14-1.3 Applicability

(a) For the purpose of counting employees, an employer, as defined in the Act and in this chapter, shall consider:

1. Employees in this State, irrespective of their eligibility for family leave;
2. Employees who work outside of the State of New Jersey; and
3. Employees of an employer’s subsidiary, division or other related entity. In making the determination of whether to count the employees of an employer’s subsidiary, division or other entity, the Division on Civil Rights will consider any or all of the following factors on a case by case basis:
 - i. The interrelationship of the employer’s operation;
 - ii. The degree of centralized control of labor relations;
 - iii. The existence of common management; and/or

iv. The degree of common ownership or financial control.

(b) To determine whether a government entity is an employer for the purposes of granting family leave, the criteria established under (a) above shall apply.

Law Review and Journal Commentaries

Federal Leave Act Broadens N.J. Coverage. David H. Ben-Asher, Elliot M. Baumgart, 133 N.J.L.J. No. 16, 10 (1993).

Case Notes

Salesperson who was discharged on day she announced her pregnancy suffered unlawful discrimination; employer's assertion that it had previously made determination to discharge salesperson was not credible. *Raiani v. Interactive Incorporated*, 96 N.J.A.R.2d (CRT) 131.

Pregnant employee failed to establish that employer's proffered reasons for discharging her were pretextual and that her pregnancy was determinative factor in decision to discharge. *Perry v. Manuel S. Newman & Company*, 96 N.J.A.R.2d (CRT) 85.

13:14-1.4 Terms of leave

(a) Family leave may be taken for up to 12 weeks within any 24 month period. The calculation of the 24 month period shall commence with the commencement of the family leave. The leave may be paid, unpaid or a combination of paid and unpaid. The employee who requests the leave must provide the employer reasonable advance notice, the length of which to be determined by the type of leave requested.

(b) An employer may establish a policy which requires employees to provide such notice in writing, except that such policy must provide that, in emergent circumstances, an employee may provide the employer with oral notice when written notice is impracticable. The policy may require that an employee must provide the employer written notice after submitting oral notice. A policy requiring written notice shall not be applicable to an employee unless the employer adequately informs the employee of such a policy.

Case Notes

Employee's conversation with her direct supervisor that she would need family leave to care for her terminally ill husband constituted sufficient proper advance notice of her need for leave. *Barone v. Leukemia Society of America*, 42 F.Supp.2d 452 (D.N.J. 1998).

13:14-1.5 Leave entitlements

(a) An eligible employee may take 12 weeks of family leave within any 24 month period in order to provide care made necessary by reason of:

1. The birth of a child of the employee;
2. The placement for adoption of a child with an employee; or
3. The serious health condition of family member of the employee.

(b) The leave may be paid, unpaid or a combination of paid and unpaid. Should an eligible employee take less than 12 weeks of family leave for any of the above reasons, such employee shall be entitled to take additional leave for any of the above reasons provided that the total leave taken does not exceed 12 weeks in any consecutive 24 month period and the other qualifications and restrictions contained in the Act, attendant to each type of leave, are not abridged.

(c) An eligible employee is entitled to up to 12 consecutive weeks of family leave in order to care for such employee's newly born child or child placed for adoption with such employee. An employee is entitled to a family leave for the birth or adoption of a child if the employer falls within the statutory definition of employer at the time leave commences and commencement of the leave begins within one year of the birth or adoption of the child. An employee taking a family leave for either of these reasons may take such leave intermittently or on a reduced leave schedule only if agreed to by the employee and the employer.

1. An employee who takes a leave for these purposes shall provide the employer with notice no later than 30 days prior to the commencement of the leave, except where emergent circumstances warrant shorter notice.

(d) An employee whose family member (as defined by the Act) has a serious health condition is entitled to up to 12 weeks of family leave taken on a consecutive, reduced leave or when medically necessary, intermittent basis. The care that an employee provides need not be exclusive and may be given in conjunction with any other care provided. When requesting family leave on an intermittent basis or reduced leave schedule, the employee shall make a reasonable effort to schedule such leave so as not to unduly disrupt the operations of the employer.

1. An employee who takes a leave in connection with the serious health condition of a family member shall provide the employer with notice, no later than 15 days prior to the commencement of the leave, except where emergent circumstances warrant shorter notice.

2. For purposes of this subsection, the total time within which an intermittent leave is taken may not exceed a 12 month period, if such leave is taken in connection with a single serious health condition. Intermittent leaves taken in connection with more than one serious health condition episode must be taken within a consecutive 24 month period, or until such time as the employee's 12 week family leave entitlement is exhausted, whichever is shorter. Any remaining family leave to which the employee is entitled, subsequent to the expiration of any or all intermittent leaves, may be taken in a manner consistent with this chapter.

3. For purposes of this subsection, an employee taking a family leave on a reduced leave schedule shall not be entitled to such leave for more than a consecutive 24 week period. An eligible employee shall be entitled to only one leave on a reduced leave schedule during any consecutive 24 month period. Any remaining family leave to which the employee is entitled subsequent to the expiration of a leave taken on a reduced leave schedule may be taken on a consecutive or intermittent basis.

(e) An employee's entitlement to return to work prior to the prearranged expiration of a requested family leave shall be governed by the employer's policy with respect to other leaves of absence.

1. If an employer permits an employee to return to work prior to the prearranged expiration of other leaves, then that policy shall similarly govern an employee's entitlement to return to work prior to the prearranged expiration of the requested family leave.

2. If an employer does not permit an employee to return to work prior to the prearranged expiration of other leaves, then the employee is not entitled to return to work prior to the prearranged expiration of family leave.

3. An employer which does not have a policy of either permitting or denying an employee to return to work prior to the prearranged expiration of any other leave of absence shall permit an employee to return to work prior to the prearranged expiration of requested family leave if the early return of an employee will not cause the employer undue hardship, such as, requiring the employer to incur the expense of continuing the employment of a temporary employee who was hired to replace the employee who is taking family leave.

(f) An employer shall not require an employee to take a leave of absence beyond the period of time that an employee requests family leave.

13:14-1.6 Disability leave

Disability leave is separate from, and in addition to, any family leave provided by the Act.

Case Notes

Pregnant claimant's civil rights claims denied for failure to prove former employer's legitimate, nondiscriminatory reasons for dismissal were pretextual. *Brady v. Dickstein Associates Insurance Agency*, 96 N.J.A.R.2d (CRT) 68.

13:14-1.7 Accrued paid leave

For the purpose of governing the use of accrued paid leave, employers shall treat family leave in the same matter as similar leaves of absence have been treated. If an employer has had a past practice or policy of requiring its employees to exhaust all accrued paid leave during a leave of absence, the employer may require employees to do so during a family leave. If an employer has a policy of allowing employees to take unpaid leaves without first exhausting accrued paid leave while on family leave, it shall not require employees to exhaust accrued paid leave while on family leave. In situations where an employer does not have an established policy in this regard, the employee shall be entitled to utilize any accrued paid leave as part of the family leave. If such an employee determines not to utilize accrued paid leave, the employer shall not require such employee to utilize any accrued paid leave as part of the leave. Where an employer maintains leaves of absence which provide different policies and/or practices regarding the use of accrued paid leave, the employer shall treat family leave in the same manner as that other leave of absence which most closely resembles family leave.

13:14-1.8 Other employment

An employee on family leave may not engage in other full-time employment during the term of the leave, unless such employment commenced prior to the leave and is not otherwise prohibited by law. During the term of family leave an employee may commence part-time employment which shall not exceed half the regularly scheduled hours worked for the employer from whom the employee requested leave. An employee may continue part-time employment which commenced prior to the employee's family leave, at the same number of hours that the employee was regularly scheduled prior to such leave. An employer may not maintain a policy or practice which prohibits part-time employment during the course of a leave.

13:14-1.9 Exemptions

(a) An employer is not required to grant a family leave to any employee who would otherwise be eligible under this Act if:

1. The employee's base salary ranks within the highest paid five percent or his or her base salary is one of the seven highest, whichever number of employees is greater (for purposes of this exception, all employees of an employer whether employed in New Jersey or not shall be included in this calculation);

2. The employer can demonstrate that the granting of the leave would cause a substantial and grievous economic injury to the employer's operations; and

3. The employer notifies the employee of its intent to deny the leave when such determination is made.

13:14-1.10 Certification by an employee

(a) An employer may require an employee who requests family leave to sign a form of certification attesting that such employee is taking family leave for the birth or adoption of a child or to care for a family member because of that family member's serious health condition, whichever is applicable. The employer may not require the employee to sign or otherwise submit a form of certification attesting to additional facts, including the employee's eligibility for family leave. Any employee who refuses to sign such certification may be denied the requested leave.

1. An employer may subject an employee to reasonable disciplinary measures, depending on the circumstances, when an employee intentionally misrepresents that such employee is taking family leave for the birth or adoption of a child or to care for a family member because of that family member's serious health condition, whichever is applicable. The form of certification established by the employer shall contain a statement warning the employee of the consequences of refusing to sign the certification or falsely certifying.

(b) An employer may require that any period of family leave be supported by certification issued by a duly licensed health care provider or any other health care provider determined by the Director to be capable of providing adequate certification.

1. Where the certification is for the serious health condition of a family member of the employee, the certification shall be sufficient if it states the date on which the serious health condition commenced, the probable duration of the condition and the medical facts within the provider's knowledge regarding the condition.

2. Where the certification is for the birth or placement of the child, the certification need only state the date of birth or date of placement, whichever is appropriate.

3. In any case in which the employer has reason to doubt the validity of the certification provided pursuant to (b)1 above, the employer may require, at its own expense, that an employee obtain an opinion regarding the serious health condition from a second health care provider designated or approved, but not employed on a regular basis, by the employer. If the second opinion differs from the certification provided pursuant to (b)1 above, the employer may require, at its own expense, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the serious health condition. The opinion of the third health care provider shall be considered to be final and shall be binding on the employer and the employee.

(c) An employer shall not use the certification requirements provided in (a) and (b) above to intimidate, harass or otherwise discourage an employee from requesting or taking family leave or asserting any of the employee's rights to family leave under these regulations or the Act.

13:14-1.11 Reinstatement

(a) Upon the expiration of a family leave, an employee shall be restored to the position such employee held immediately prior to the commencement of the leave. If such position has been filled, the employer shall reinstate such employee to an equivalent position of like seniority, status, employment benefits, pay, and other terms and conditions of employment.

(b) If, during a family leave provided by the Act, the employer experiences a reduction in force or layoff and the employee would have lost the employee's position had the employee not been on leave, as a result of the reduction in force or pursuant to the good faith operation of a bona fide layoff and recall system including a system under a collective bargaining agreement where applicable, the employee shall not be entitled to reinstatement to the former or an equivalent position. The employee shall retain all rights under any applicable layoff and recall system, including a system under a collective bargaining agreement, as if the employee had not taken the leave.

Law Review and Journal Commentaries

Job Equivalence is Key Leave Issue. Courtney E. Redfern, 136 N.J.L.J. No. 15, 526 (1994).

13:14-1.12 Multiple requests for family leave

An employer shall grant a family leave to more than one employee from the same family (for example, brother and a sister) at the same time, provided such employees are otherwise eligible for the leave.

13:14-1.13 Employers with multiple leaves of absence

Where an employer maintains leaves of absence which provide benefits, other than health benefits, that differ depending upon the type of leave taken, such employer shall provide those benefits to an employee on family leave in the same manner as it provides benefits to employees who are granted that other leave of absence which most closely resembles family leave.

13:14-1.14 Retroactivity

Any leave of absence granted to an employee prior to the effective date of the Act shall not be considered a family leave for purposes of determining an employee's entitlement to a family leave under the Act, with the following exception: any period of leave taken by an employee within one year prior to the employee's eligibility for family leave, for the purpose of providing care made necessary because of the birth or placement for adoption of a child, shall be considered as part of the employee's family leave entitlement.

ment under the Act, if such leave maintained the same benefits and preserved the same rights as are required by the Act.

13:14-1.15 Prohibition against retaliation

No employer shall discharge or in any way retaliate against or penalize any employee because such employee sought information about family leave provisions, filed a complaint alleging a violation of the Act or this chapter or exercised any right granted under the Act or this chapter.

13:14-1.16 Processing of complaints

Any complaint filed in the Division which alleges a violation of the Act or these regulations shall be processed in the same manner as a complaint filed under the terms of N.J.S.A. 10:5-1 et seq. and N.J.A.C. 13:4.